Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-283

IN THE

Supreme Court of the United States

October Term, 1987

JOSEPH G. BUDINICH,

Petitioner,

v.

BECTON DICKINSON AND COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

THOMAS E. FRANK*
WILLIAM S. FINGER**

FRANK & FINGER, P.C.
29025D Lakepoint Center
P.O. Box 1477
Evergreen, Colorado 80439
(303) 674-6955

Counsel for Petitioner

EDWIN S. KAHN*
TERRE LEE RUSHTON**

KELLY/HAGLUND/GARNSEY
& KAHN
300 Blake Street Building
1441 Eighteenth Street
Denver, CO 80202
(303) 296-9412

Counsel for Respondent

*Counsel of Record

**Application for Admission filed or to be filed

PETITION FOR CERTIORARI FILED JULY 14, 1987
CERTIORARI GRANTED OCTOBER 13, 1987

TABLE OF CONTENTS

PAGE

Relevant Docket Entries 1

First Amended Complaint For Money Damages Dated July 1, 1982 filed In The United States District Court For The District Of Colorado 5

Answer To First Amended Complaint dated July 8, 1982 filed In The United States District Court For The District Of Colorado 12

Order Granting In Part And Denying In Part Defendant's Motion For Summary Judgment And Order Denying Plaintiff's Motion For Partial Summary Judgment entered by The United States District Court For The District Of Colorado dated May 31, 1983

*Appears At Pages 23 Through 29 of Petition For Writ Of Certiorari

Motion For Reconsideration Of Summary Judgment Order Or In The Alternative For Certification Of Question Of Law Of The Colorado Supreme Court dated June 2, 1983 filed In The United States District Court For The District Of Colorado ... 18

Judgment Of March 26, 1984 Entered In The United States District Court For The District Of Colorado

*Appears At Pages 30 And 31 Of Petition For Writ Of Certiorari

Motion For New Trial; Amendment Of Judgment; Relief From Judgment Or Order dated April 2, 1984 filed by Plaintiff In The United States District Court For The District Of Colorado 24

Motion For Attorneys Fees dated April 2, 1984 filed by Plaintiff In The United States District Court For The District Of Colorado..... 29

Amended Motion For New Trial, Amendment Of Judgment, Relief From Judgment Or Order dated April 6, 1984 30

PAGE

Memorandum In Support Of Motion For New Trial; Amendment Of Judgment; Relief From Judgment Or Order dated April 6, 1984 filed In The United States District Court For The District Of Colorado 31

Memorandum In Support Of Amended Motion For New Trial; Amendment Of Judgment; Relief From Judgment Or Order dated April 6, 1984 filed In The United States District Court For The District Of Colorado 39

Memorandum In Support of Attorneys Fees As Costs dated April 6, 1984 filed In The United States District Court For The District Court Of Colorado 41

Motion To Review Taxation Of Costs dated April 13, 1984 filed by Plaintiff In The United States District Court For The District Of Colorado 44

Order Of May 14, 1984 entered In The United States District Court For The District Of Colorado

*Appears At Pages 32 Through 45 Of Petition For Writ Of Certiorari

Order Of July 3, 1984 entered In The United States District Court For The District Of Colorado

*Appears At Pages 46 Through 54 Of Petition For Writ Of Certiorari

Motion For Amendment Of Order Or, Relief From Judgment And Order dated July 13, 1984 filed In The United States District Court For The District Of Colorado 46

Memorandum In Support Of Motion For Amendment Of Order Or, Relief From Judgment And Order dated July 13, 1984 filed In The United States District Court For The District Of Colorado 47

Order Of August 1, 1984

*Appears At Pages 52 Through 54 Of Petition For Writ Of Certiorari

Notice Of Appeal dated August 28, 1984 filed In The United States District Court For The District Of Colorado 51

PAGE

Per Curiam Opinion Of The United States Court Of Appeals For The Tenth Circuit dated December 12, 1986

*Appears At Pages 13 Through 20 Of Petition For Writ Of Certiorari

Petition For Rehearing filed In The United States Court Of Appeals For The Tenth Circuit dated December 26, 1986

*Appears At Pages 55 Through 59 Of Petition For Writ Of Certiorari

Order Of The United States Court Of Appeals For The Tenth Circuit Denying The Petition For Rehearing, Reviewed As A Motion For Recall dated March 26, 1987

*Appears At Pages 21 Through 22 Of Petition For Writ Of Certiorari

CHRONOLOGICAL LISTING OF RELEVANT DOCKET ENTRIES

July 1, 1982	First Amended Complaint For Money Damages filed in Budinich vs. Becton Dickinson & Company, The United States District Court For The District Of Colorado, C.A. No. 82F462
July 8, 1982	Answer To First Amended Complaint filed by Becton Dickinson & Company, The United States District Court For The District Of Colorado, C.A. No. 82F462
April 13, 1983	Amended Pretrial Order entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 29, 1983	Motion For Summary Judgment filed by Becton Dickinson & Company in The United States District Court For The District Of Colorado, C.A. No. 82F462
May 13, 1983	Motion For Partial Summary Judgment filed by Budinich in The United States District Court For The District Of Colorado, C.A. No. 82F462
May 31, 1983	Order Granting In Part And Denying In Part Defendant's Motion For Summary Judgment And Order Denying Plaintiff's Motion For Partial Summary Judgment, The United States District Court For The District Of Colorado, C.A. No. 82F462
June 2, 1983	Motion For Reconsideration Of Summary Judgment Order Or In The Alternative For Certification Of Question Of Law To The Colorado Supreme Court filed by Plaintiff, The United States District Court For The District Of Colorado, C.A. No. 82F462
June 6, 1983	Minute Order denying Motion For Reconsideration and Certification of Question to Colorado Supreme Court entered in The United States District Court For The District Of Colorado, C.A. No. 82F462

June 15, 1983	Order declaring mistrial as a result of jury inability to render verdict, entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
January 27, 1984	Motion requesting confirmation of prior orders filed by Becton Dickinson & Company in The United States District Court For The District Of Colorado, C.A. No. 82F462
March 2, 1984	Order of Court granting in part and denying in part request to confirm prior orders entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
March 16, 1984	Motion For Reinstatement of claims filed by Plaintiff in The United States District Court For the District Of Colorado, C.A. No. 82F462
March 26, 1984	Judgment entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 2, 1984	Motion For New Trial, Amendment of Judgment; Relief From Judgment Or Order filed by Budinich in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 2, 1984	Motion For Attorneys Fees filed by Budinich in The United States District Court For the District Of Colorado, C.A. No. 82F462
April 6, 1984	Amended Motion for New Trial, Amendment of Judgment, Relief from Judgment or Order filed in The United States District Court For The District of Colorado, C.A. 82F462
April 6, 1984	Memorandum In Support Of Motion For New Trial; Amendment Of Judgment; Relief From Judgment Or Order filed in The United States District Court For The District Of Colorado, C.A. No. 82F462

April 6, 1984	Memorandum In Support Of Amended Motion For New Trial; Amendment Of Judgment; Relief From Judgment Or Order filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 6, 1984	Memorandum In Support Of Attorneys Fees As Costs filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 13, 1984	Motion To Review Taxation Of Costs filed by Plaintiff in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 16, 1984	Motion To Review Taxation Of Costs filed by Becton Dickinson & Company in The United States District Court For The District Of Colorado, C.A. No. 82F462
May 14, 1984	Order relating to post trial motions, granting attorney fees to Plaintiff but holding amount in abeyance entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
July 3, 1984	Order granting to Plaintiff $1,000.00 attorney fees entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
July 13, 1984	Motion For Amendment Of Order Or, Relief From Judgment And Order filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
July 13, 1984	Memorandum In Support Of Motion For Amendment Of Order Or, Relief From Judgment And Order filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
August 1, 1984	Order denying reconsideraton entered in The United States District Court For The District Of Colorado, C.A. No. 82F462.

August 29, 1984	Notice Of Appeal filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
September 25, 1984	Defendant's Motion For Summary Disposition Of Appeal filed in The United States Court Of Appeal For The Tenth Circuit, No. 84-2192
December 12, 1984	Per Curiam Opinion of The United States Court Of Appeals For The Tenth Circuit, No. 84-2192
December 26, 1986	Petition For Rehearing filed in The United States Court Of Appeals For The Tenth Circuit, No. 84-2192
March 26, 1987	Order denying Petition For Rehearing, reviewed as a Motion For Recall entered in The United States District Court Of Appeals For The Tenth Circuit, No. 84-2192
June 23, 1987	Application For Extension Of Time To File Petition For Writ Of Certiorari filed by Plaintiff to the United States Supreme Court, C.A. No. A-946
July 14, 1987	Petition For Writ of Certiorari filed with The United States Supreme Court, C.A. No. 87-283
September 8, 1987	Brief of Respondent Becton Dickinson in opposition to Petition For Writ of Certiorari filed in The United States Supreme Court, C.A. No. 87-283
October 13, 1987	Order of Supreme Court granting Writ of Certiorari, C.A. No. 87-283

FIRST AMENDED COMPLAINT FOR MONEY DAMAGES DATED JULY 1, 1982 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 82-F-462

JOSEPH G. BUDINICH, Plaintiff,	)	
vs.	)	FIRST AMENDED COMPLAINT FOR MONEY DAMAGES
BECTON DICKINSON & COMPANY, Defendant.	)	

Plaintiff brings this action and alleges as follows:

1. This is an action for breach of contract, quantum meruit, misrepresentation and outrageous conduct.

2. Plaintiff Joseph G. Budinich at all times relevant hereto resided in Arapahoe County, Colorado and worked in the City and County of Denver at Suite 111, 180 Cook Street, Denver, Colorado.

3. Defendant Becton Dickinson and Company, a foreign corporation, whose principal place of business is located in Paramus, New Jersey, is not registered with the Secretary of the State of Colorado to do business in this state. At all times relevant hereto, Defendant did business in this state through a division of said corporation known as Energetics Science at a branch office located at 180 Cook Street, Suite 111, Denver, Colorado 80206.

4. Prior to October 25, 1978, Plaintiff Joseph Budinich entered into a business relationship with Energetics Science, Inc. as a manufacturer's representative.

5. During this business relationship, Defendant Becton Dickinson and

Company acquired Energetics Science, Inc. and continued the relationship between the Plaintiff and Energetics Science.

6. On or about October 1, 1978 the Plaintiff was approached by a representative of the Defendant who solicited the Plaintiff for association as Western Regional Manager for Defendant's Energetic Science division.

7. During the month of October 1978 correspondence was exchanged between the Plaintiff and representatives of the Defendant pertaining to responsibility of the Western Regional Manager position and the compensation that would be paid.

8. The following benefits and compensation were promised by Defendant to Plaintiff if Plaintiff accepted the position of Western Regional Manager:

a. $22,000 per year salary paid bi-weekly.
b. 100% business expenses paid by the Company.
c. A leased car with a new car available every two years.
d. Commissions pursuant to set schedule which is attached to this complaint as Exhibit A and incorporated by reference.
e. Two weeks paid vacation, life insurance equal to one year's salary paid by the company, travel insurance valued at $50,000 paid by the company, Blue Cross major medical high option company paid coverage.

9. Based on the oral and written representations of the Defendant, Plaintiff accepted association as Western Regional Manager for Defendant and operated an office for the Defendant at 180 Cook Street, Denver, Colorado.

10. Immediately upon accepting employment with the Defendant, Plaintiff began working on a potentially lucrative proposal to provide propellant vapor detector equipment manufactured by Energetic Science Division to the Air Force for its space and missile program.

11. During the early part of May, 1979, Plaintiff met with Air Force officials regarding this project and reported back to the Company

concerning his meeting reporting that the project was at least a million dollar deal and 90% sold.

12. After the May, 1979 meeting with the Air Force, Plaintiff continued to work on the project and received an oral commitment from the Air Force to purchase the equipment. This commitment was known to the Defendant and its employees including Plaintiff's supervisor.

13. During the months of September - October, 1979 Defendant unilaterally changed its commission structure with the express intent of depriving the Plaintiff and others in similar positions of substantial commission for large orders that were, or were about to be, earned.

14. After the change of commission format, the Defendant and the U.S. Air Force through Plaintiff's efforts entered into a contract for sale of the propellant vapor detective device equipment referred to above.

15. Subsequent thereto during calendar year 1981 the contract was updated and modified to a $2,116,000.00 contract. Thereafter, at an unknown date, a supplemental order was executed by the Air Force and the Defendant in the approximate amunt of $850,000.00.

FIRST CLAIM FOR RELIEF

16. Plaintiff incorporates by reference paragraphs 1 through 15 of this complaint.

17. The employment contract entered into between Plaintiff and Defendant calls for a fixed and established commission schedule that was negotiated between the parties.

18. Plaintiff relying on said employment contract including the schedule of commissions, substantially negotiated a contract with the United States Air Force for the sale of the propellant vapor detector equipment that was manufactured and supplied by the Defendant.

19. Defendant knowing said contract was eminent willfully and intentionally breached the provisions of the employment contract with Plaintiff by

unilaterally changing the agreed upon compensation schedule.

20. The decision by Defendant to modify the compensation schedule with the Plaintiff was a deliberate and willful attempt to avoid paying the commission that was or was about to become due.

21. Said unilateral modification was done after substantial reliance by the Plaintiff and substantial performance by the Plaintiff under the terms of the employment contract.

22. Defendant's actions were a breach of contract.

23. Plaintiff is entitled to, pursuant to the commission schedule under which he was hired, an amount of $84,640.00 in commission as a result of the inital contract entered into with the United States Air Force for propellant vapor detector equipment, and an additional amount to be proven at trial on the supplemental order on the propellant vapor detector equipment.

24. Defendant has paid to the Plaintiff at this time $10,000 as a commission, relating to the sale of said equipment to the Air Force.

25. As a direct and proximate result of Defendant's breach of contract, Plaintiff has been deprived of $74,640 due and owing pursuant to the employment contract entered into between the Plaintiff and Defendant on the 1981 order, and an additional amount to be proven at trial on the supplemental order.

WHEREFORE, Plaintiff prays that this Court enter judgment for the Plaintiff against the Defendant in the amount of $74,640 on the 1981 contract and an additional amount to be proven at trial on the supplemental order, plus interest and costs.

SECOND CLAIM FOR RELIEF

26. Plaintiff brings this claim in the alternative to the first claim for relief and realleges and incorporates by reference paragraphs 1 through 15.

27. At the time Defendant unilaterally modified the commission schedule without Plaintiff's consent, no binding contract existed between the parties.

28. Plaintiff is entitled to the value of the services he has rendered.

29. The value of the services rendered by the Plaintiff to this Defendant according to the custom and standard of the industry would entitle the Plaintiff to at least a 15% commission on goods and services sold.

30. Plaintiff in this action secured for Defendant an initial contract in the amount of $2,116,000.00 and a supplemental contract in excess of $800,000.00, for which he is entitled to a commission in an amount in excess of $437,400.00.

31. Defendant has paid to the plaintiff $10,000.00. An unpaid amount of approximately $427,400.00 is due and owing the Plaintiff for the value of services rendered.

WHEREFORE, Plaintiff prays the Court enter judgment for the Plaintiff against the Defendant in an amount to be proven at trial, plus interest in costs.

THIRD CLAIM FOR RELIEF

32. Plaintiff realleges and incorporates by reference paragraphs 1 through 25.

33. Defendant had no intention of paying the Plaintiff commissions on large orders as represented in the written material supplied and oral promises made to the Plaintiff.

34. The writings supplied and oral promises made by Defendant to Plaintiff constituted a material misrepresentation of Defendant's commission schedules and intentions to compensate Plaintiff for sales.

35. Said misrepresentation regarding the commission schedule was a material misrepresentation of fact that was reasonably relied upon by the Plaintiff.

36. On information and belief said misrepresentation was made willfully, wantonly or negligently by Defendant.

37. As a result of said misrepresentation Plaintiff was induced to

actively solicit large accounts, including but not limited to the contract in question, and Plaintiff spent substantial time and energy in securing contracts under the reasonable belief that he would be compensated as promised.

38. As a result of Defendant's misrepresentation Plaintiff has been deprived of commissions in an amount to be proven at trial, that is in excess of $74,640.

WHEREFORE, Plaintiff prays that the Court enter the following relief for Plaintiff against Defendant:

a. Award Plaintiff compensatory damages in an amount to be proven at trial.

b. Award Plaintiff punitive damages in the amount of $350,000.

c. Award Plaintiff interest and costs in bringing this action.

FOURTH CLAIM FOR RELIEF

39. Plaintiff realleges and incorporates by reference paragraphs 1 through 38.

40. During the later part of 1981 Plaintiff and Defendant became aware that the Air Force would place a supplemental order relating to the vapor detector equipment.

41. In anticipation that the order would be placed, Defendant terminated the employment of the Plaintiff on November 30, 1981 with the express intent of depriving Plaintiff of any additional commissions on said order.

42. Said termination was done contrary to Defendant's internal policies, directives, and procedures.

43. Said firing was pretextural and done wilfully, wantonly and intentionally.

44. Defendant's conduct in total and in terminating Plaintiff under the circumstances set forth herein is conduct of a shocking or outrageous nature to the ordinary person, and constitutes outrageous conduct.

45. As a direct and proximate result of Defendant's outrageous conduct, Plaintiff was deprived of income and salary from January 1, 1982 through April 1, 1982 in the amount of $6,775.00. Further, as a direct and proximate result of Defendant's action, Plaintiff was deprived of additional commissions on the orders placed on the vapor detector equipment.

WHEREFORE, Plaintiff prays the Court enter the following relief for Plaintiff and against Defendant:

a. Award Plaintiff compensatory damages in the amount of $6,775.00 for loss of wages.

b. Award Plaintiff compensatory damages in an amount to be proven at trial for loss of commission on the Air Force contract.

c. Award Plaintiff punitive damages in the amount of $350,000.00.

d. Award Plaintiff interest and costs in bringing this action.

PLAINTIFF DEMANDS A JURY TRIAL OF SIX PERSONS.

Respectfully submitted,

FRANK, LOWE AND FINGER, P.C.

By _____/ sig /_____

William S. Finger, #7224
29025D Lakeshore Center
P.O. Box 1477
Evergreen, CO 80439
(303) 674-6955

*[Attachment omitted in printing]

ANSWER TO FIRST AMENDED COMPLAINT FILED IN THE UNITED STATES DISCTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Defendant Becton Dickinson & Company, by and through counsel, Kelly/Haglund/Garnsey & Kahn, for its answer to Plaintiff's First Amended Complaint, admits, denies and avers as follows:

GENERAL ALLEGATIONS

1. The allegations of paragraph 1 of the Complaint are admitted.

2. Answering paragraph 2, the defendant has insufficient information or knowledge to form a belief as to the truth of the allegation as to Plaintiff's residence, and the same is therefore denied. The remaining allegations in paragraph 2 are admitted.

3. Answering paragraph 3, defendant admits that Becton Dickinson & Company is a corporation with its principal place of business in Paramus, New Jersey, and that it is doing business in Colorado through a wholly owned division of the company known as Energetics Science acquired by the defendant on or about June 28, 1978. Defendant further admits that the office used by Plaintiff during his business relationship with defendant was located at 180 Cook Street, Suite 111, Denver, Colorado 80206.

4-5. Answering paragraphs 4 and 5, defendant, based on information and belief, admits that Plaintiff was a manufacturers representative for Energetics Science prior to the time that the defendant acquired that company. Defendant further admits that defendant acquired Energetics Science, Inc. on or about June 28, 1978, and changed the name of that company to Energetics Science. Defendant denies the remaining allegations of paragraphs 4 and 5.

6. Answering paragraph 6 of the Complaint, defendant admits that, during October of 1978 the Plaintiff and a representative of the defendant

engaged in discussions concerning the employment of plaintiff as the Western Regional Manager for Energetics Science. Defendant denies the remaining allegations of paragraph 6.

7. Answering paragraph 7 of the Complaint, defendant admits that correspondence was exchanged in October of 1978 between plaintiff and Mr. John D. McStravick, Vice President of Marketing, Energetics Science, relating to the duties and responsibilities of the Western Regional Manager and concerning the compensation and the specific commission plan in effect during the fiscal year up to and including October 25, 1978. The remaining allegations of paragraph 7 are denied.

8. Answering paragraph 8 of the Complaint, defendant admits that on October 25, 1978, it advised plaintiff that the position of Western Regional Manager for Energetics Science would include the following benefits and compensation:

(a) A salary of $22,000 per year paid bi-weekly.

(b) All business expenses to be paid by the Company.

(c) A leased car with a new car available every two years.

(d) Commissons to be paid pursuant to a commission schedule to be adjusted at the beginning of each fiscal year of employment. The commission schedule in effect on October 25, 1978 and until September 30, 1979 is that schedule attached to the complaint.

(e) Two weeks paid vacation, life insurance equal to one year salary paid by the company, travel insurance valued at $50,000 paid by the company, and Blue Cross major medical high option company paid coverage.

Defendant denies the remaining allegations of paragraph 8.

9. Answering paragraph 9 of the Complaint, defendant admits that plaintiff was employed as Western Regional Manager for Energetics Science beginning on January 1, 1979, and operated an office located at 180 Cook Street, Suite 111, Denver, Colorado. The remaining allegations of paragraph 9 are denied.

10. Answering paragraph 10, defendant admits that, beginning in January, 1978, Energetics Science was engaged in negotiating to provide propellant vapor detector equipment to the United States Air Force. Defendant further admits that numerous employees of defendant and Energetics Science, including plaintiff, were involved in these negotiations during the period from January of 1978 through and including the present, including that period when plaintiff was acting as Western Regional Manager for Energetics Science. The remaining allegations of paragraph 10 are denied.

11.-12. Answering paragraphs 11 and 12, defendant admits that negotiations between Energetics Science and the United States Air Force took place in 1979, said negotions involving modifications requested by the Air Force prior to entering into a contract with the defendant. Defendant specifically denies that any contract, order or commitment between the United States Air Force and Energetics Science or defendant was entered into in calendar year 1979. The remaining allegations of paragraphs 11 and 12 are denied.

13. Answering paragraph 13, defendant admits that the commission plans applicable to plaintiff and all other regional managers were as follows:

Fiscal Year	Period Covered	Effective Date of Plan/Change
FY 1979	October 1, 1978 — September 30, 1979 (for plaintiff: January 1, 1979 — September 30, 1979)	October 1, 1978
FY 1980	October 1, 1979 — September 30, 1980	October 1, 1979
FY 1981	October 1, 1980 — June 30, 1981	October 1, 1980
FY 1982	July 1, 1981 — June 30, 1982	July 1, 1981

Defendant admits that, on or about January 21, 1981, the fiscal year applicable to commissions was changed to reflect a period from July 1st to June 30th of the applicable years, in order to insure that orders entered within a given quarter of commission year would be shipped within the corresponding fiscal year. The remaining allegations of paragraph 13 are specifically denied.

14-15. Answering paragraphs 14 and 15, defendant admits that Energetics Science, accepted a letter contract with the United States Air Force on August 6, 1980, for the sale to it of propellant vapor detector equipment in the amount of one million nine hundred thirty five thousand three hundred seventy two dollars and 60/100 ($1,935,372.60). Defendant admits that said letter contract was superseded by a definitive contract, executed on or about August 7, 1981 in the adjusted amount of two million one hundred sixteen thousand dollars ($2,116,000.00) and that a second supplemental order in the adjusted amount of $2,478,018.00. On or about January 1982, a second and separate contract was negotiated and executed between the defendant and the U.S.A.F., that contract being for additional vapor propellant detector equipment in the amount of $600,013.00. Defendant admits that the applicable commission plans for plaintiff and all other regional managers in effect during those time periods were the plans for fiscal year 1980 and fiscal year 1981, respectively. The remaining allegations of paragraph 14 and 15 are denied.

FIRST CLAIM FOR RELIEF

16. Answering paragraph 16 of the First Claim for Relief, defendant hereby incorporates by reference the answers made to the allegations of paragraph 1 through 15 above.

17. Answering paragraph 17, defendant admits that the employment arrangement between plaintiff and defendant incorporated such commission schedules as were to be established from time to time by the defendant. The remaining allegations of paragraph 17 are denied.

18-23. Defendant denies the allegations contained in paragraphs 18 through 23.

24. Answering paragraph 24, defendant admits that plaintiff had been paid $10,000 to date as a commission relating to the definitive contract between the United States Air Force and defendant dated August 7, 1981.

25. Defendant denies the allegations contained in paragraph 25.

SECOND CLAIM FOR RELIEF

26. Answering paragraph 26 of the Second Claim for Relief, defendant hereby incorporates by reference the answers to paragraphs 1 through 15 above.

27-31. Defendant admits that it has paid $10,000.00 to Plaintiff as commissions on the sale of propellant vapor detector equipment to the United States Air Force. Defendant denies all other allegations contained in paragraphs 27 through 31.

THIRD CLAIM FOR RELIEF

32. Answering paragraph 32 of the Third Claim for Relief, defendant hereby incorporates by reference the answers to paragraphs 1 through 25 above.

33-38. Defendant denies the allegations of paragraphs 33 through 38.

FOURTH CLAIM FOR RELIEF

39. Answering paragraph 39 of the Fourth Claim for Relief, Defendant hereby incorporates by reference the answers to Paragraphs 1 through 38 above.

40. Answering paragraph 40 of the Fourth Claim for Relief, Defendant has no information or knowledge concerning Mr. Budinich's "awareness"

of a supplemental Air Force Contract, and therefore denies the same. Defendant admits that the Air Force Contract in question was modified on March 11, 1982 after continuing negotiations with the Air Force.

41-45. Defendant denies the allegations of paragraphs 41 through 45.

SECOND AND SEPARATE DEFENSE

By accepting changed commissions and changed compensation under the commission plans for fiscal years 1980, 1981, and 1982 plaintiff has acquiesced to such plans, and his claims against defendant are barred by such acquiescence.

THIRD AND SEPARATE DEFENSE

Any claim for punitive damages is barred by 1973 C.R.S. 13-80-104.

WHEREFORE, defendant prays that judgment be entered in its favor, for its costs herein, and for such further relief as the court may deem proper. In addition, defendant is entitled to its attorney's fees in defending against The Third Claim for Relief and Fourth Claim for Relief in their entirety, and against The Second Claim for Relief to the extent said claim seeks damages in excess of $74,640, because said claims are frivolously brought and maintained under 1973 C.R.S. 13-17-101.

[Signature and Certificate on service omitted in printing]

MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT ORDER OR IN THE ALTERNATIVE FOR CERTIFICATION OF QUESTION OF LAW OF THE COLORADO SUPREME COURT DATED JUNE 2, 1983 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Joseph Budinich hereby moves the Court for reconsideration of its order of Partial Summary Judgment entered on May 31, 1983, granting in part Defendant's Motion for Summary Judgment relating to the contract claims and wrongful discharge claims in this matter. As grounds for this motion Plaintiff will show the Court as follows:

1. The Court in its order of May 31, 1983 found as a matter of fact and law that the employment relationship between the parties was a terminable at will situation. This finding by the Court was made without consideration of the Employment Manual and Personnel Policy Handbook of the Defendant. Plaintiff has endorsed this Handbook as Plaintiff's Exhibit 16, and page 4.6 of the Personnel Manual as Exhibit 14. Plaintiff submits that the Court's finding is an incorrect conclusion at law and fact. The Personnel Handbook clearly abates the terminable at will positions and controls relating to terminability. Plaintiff in its Motion For Summary Judgment included a copy of the disciplinary procedure, marked as deposition Exhibit 19, that was entered in the deposition of Defendant McStravick filed with the Court.

In relevant part the disciplinary action procedure establishes a five step process that must be conformed with prior to termination. The description of the procedure is a formal procedure "to provide a consistent and fair system for counseling and disciplinary action when necessary." Further, the procedure requires formal written steps, signature of the employee on disciplinary action and copies of the disciplinary action steps being placed in the personnel file of the employee. There is no testimony in the record to

support Defendant's termination based on the five required disciplinary steps, or any indication that gross misconduct or an infraction of the rules occurred to warrant immediate termination. As indicated in Plaintiff's Brief, the State of New York has already determined that an Employer's Handbook can abregate the policy of terminable at will. See, Weiner v. McGraw-Hill, Inc. 443 N.E.2d 441 (N.Y. 1982). (See, also, Murphy v. American Home Products Corp. State of New York Court of Appeals, Number 35 slip opinion (March 29, 1983) at page 7 supplied in Defendant's last Brief, reaffirming the Weiner, supra decision. Colorado has not considered the question. Plaintiff asserts that Defendant, whose principal place of business for its Energetic Science Division is New York State, is estopped from claiming that New York law does not control on the question of terminable at will under its handbook. Plaintiff believes that this Court has erroneously made a legal and factual determination on the issue of terminable at will without considering an essential element in this case.

2. The Court has erroneously held that since the employment situation was terminable at will, the compensation system was terminable at will. The assumption by the Court is inherently wrong both as to the legal position adopted by the parties, the factual situation and the underlying assumption that the employee-employer relationship was terminable at will. Defendant's position throughout this litigation was that the commission schedule was a minimaily guaranteed program for a fiscal year. (The fiscal year ended September 30, 1979). Plaintiff's position was that the commission schedule was a guaranteed and represented as applying throughout the course of employment. Plaintiff is prepared to show as a factual matter that Defendant in at least one other circumstance has represented that the entire compensation program which included a car, was the agreement and to renege on any agreed upon condition or term would be improper. See attached memo from John McStravick to Robert Lieb dated March 19, 1981. Plaintiff is prepared to show that the two employees mentioned in the memorandum were employed approximately at the same time Plaintiff was employed. Plaintiff

contends that the compensation schedule was a condition of employment and was considered in accepting the position. Plaintiff additionally attaches a memorandum dated November 24, 1981 from McStravick to Lieb indicating that the items covered in the compensation plan were conditions of employment. This is exactly Plaintiff's claim and the Court has erroneously summarily judged the issue.

3. The Court has wrongfully precluded Plaintiff from claiming a commission under contract for the sale of the 79 PVD's. The evidence is unequivacable that this sale, including number of items, terms of sale, and price was fully negotiated and completed on Plaintiff's last day of employment. In this regard the depositions, testimony of witnesses, and endorsed Exhibits to demonstrate that on March 13, 1981 the Air Force furnished to the Defendant a solicitation, offer and award under RFP. FD2020-81-25404 for solicitation to bid on the sale of 66 PVD units, with Defendant being the only known source. On March 23, 1981 Defendant's agent Curry issued a memorandum informing other corporate employees of the receipt of the RFP indicating quote "Our proposal will not entail an elaborate submission. It will only consist of the cost data and a simple technical proposal stating that the units to be supplied will duplicate those as finally approved and accepted under the existing contract." A copy of that memorandum is attached. The evidence will further indicate that on July 22, 1981 the Air Force modified the amendment of soliciation by increasing the quantity from 66 to 79 PVD units and establishing other items to be procured. A copy of that amended solicitation is attached. On August 31, 1981 Defendant's agent responded to the solicitation with a proposal. On October 6, 1981 the Defendant submitted a revised proposal indicating that the parties were striding for a contract prior to December 1, 1981. See second page of October 6, 1981 letter. A copy of that document is attached. Between October 6, 1981 and November 5, 1981 the parties has agreed upon everything but price because an audit needed to be done. By November 5, 1981 the audit had been completed and certain questions were raised. (See November 5, 1981 letter attached). On

November 30, 1981 the parties reached final agreement regarding the contract terms and price, fixing the total negotiated price at $600,013.00. A copy of Defendant's letter to that effect is attached. Approximately eight days after the agreement on final price was reached Defendant was informed by telephone that a contract number had been assigned to the project. That information appears in a handwritten memorandum from Defendant's contract administrator, attached hereto.

Plaintiff's last day of employment with Defendant was November 30, 1981. Plaintiff is entitled to have the jury consider whether the terms of contract has been fully and completely negotiated and an agreement had been reached on November 30, 1981 for the procurement of the 79 PVD's. Even if this Court does not accept the theory that the 4% commission was binding throughout Plaintiff's employment, Plaintiff would still be entitled to a $5,000 commission on the sale of the 79 PVDs under the then existing major order program imposed by the Defendant. The question of whether this sale took place within the terms of employment is clearly one of fact. See Great Falls Property, Inc. v. Professional Group, Ltd. 649 P.2d 1028 (Colo. 1982). The Court's ruling is clearly erroneous.

4. The Court has erroneously summarily judged the outrageous conduct claims. The Court must reconsider its position in lieu fo the disciplinary action procedure policy and it serving as a limitation on the at will employee situation. Substantial facts as enumerated within the briefs show a pattern of reckless disregard for its rights in this matter. The question is one inappropriately taken away from the jury's consideration.

5. The Court has wrongfully decided the question of waiver or estoppel in this matter. The evidence is clear and uncontradicted that Mr. Joseph Budinich when initially informed of the unilateral modification of commission schedule, protested that modification. The record is quite clear that not only did Mr. Budinich immediately protest the change in letter form, but orally raised the objection on numerous occasions. The Court also erroneously finds that Mr. Budinich continued to accept commission under the revised

schedule. The Court obviously doesn't understand that no commission was paid to Mr. Budinich under the revised schedule on major orders other than the commission in question. The Court impliedly holds the only available avenue of redress to the employee was either quitting employment, thereby potentially forfeiting the commission, or maintenance of a legal action for anticipatory breach of contract. Since no commission was due until the order was finalized according to Defendant's statement, Plaint could not claim a wrong for actual breach. The actual breach of contract occurred in or about October, 1981. The Court has no valid factual or legal basis on which it can draw its conclusion. The rule of law governing this matter is that where a breach of contract exists, the party not in breach may elect to complete performance and thereafter sue for money damages. The innocent party is not required to terminate performance and jeopardize the possibility of recovery. This Court has committed a substantial error in its holding in regard to the waiver and estoppel issue.

6. The Colorado Supreme Court has not addressed any questions relating to wrongful termination of employment. The leading case in this state is from the Court of Appeals. In that decision the Court of Appeals did not consider the question of whether willful violation of one's own Employment Manual constitutes wrongful termination. Similarly, the Supreme Court has not faced the question whether intentioanl firing in anticipation of receipt of a substantial order constitutes wrongful termination. This Court has summarily dismissed Plaintiff's claim of wrongful termination without basis under Colorado law. The appropriate actionf or this Court under those issues, if the Court was considering dismissal, was certification to the Colorado Supreme Court for a definative statement of the law in this state. The Court has erred in failing to take such steps to reach a definitive outcome on issues of first impression.

7. Plaintiff submits that this Court has also failed to consider questions of promissory estoppel, bad faith modification of commission schedules and other issues raised in the memorandum submitted by Plaintiff.

WHEREFORE, Plaintiff requests that this Court reinstate the dismissed claims and allow this matter to proceed to trial on all issue, or alternatively to certify to the Colorado Supreme Court questions of first impression under the laws of this state.

[Signature and Certificate of Mailing omitted in printing]

MOTION FOR NEW TRIAL: AMENDMENT OF JUDGMENT: RELIEF FROM JUDGMENT OR ORDER DATED APRIL 2, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff Joseph Budinich, pursuant to Rules 59 and 60 of the Federal Rules of Civil Procudre hereby moes this Court for a new trial, amendment of judgment and relief from judgment or order. As grounds for this motion Plaintiff would specifically show the Court that it seeks a new trial, amendment of judgment and relief from judgment or order as follows:

1. Plaintiff seeks amendment of judgment, and relief from judgment or order from the Court's Summary Judgement Order dated May 31, 1983 granting in part Defendant's Motion for Summary Judgment relating to Plaintiff's contract claims and implied contract claims relating to the sale of the 157 PVD order.

2. Plaintiff seeks amendment of judgment and relief from judgment or order from the Court's Summary Judgment Order dated May 31, 1983 granting to Defendant summary judgment on Plaintiff's contract and implied contract claims on the amendment to the original contract providing for provisioning and spare parts.

3. Plaintiff moves for amendment of judgment and relief from judgment or order relating to the Court's May 31, 1983 granting a partial summary judgment to the Defendants on Plaintiff's outrageous conduct claims.

4. Plaintiff moves for amendment of judgment and relief from judgment or order relating to the Court's granting of summary judgment on May 31, 1983 pertaining to Plaintiff's claim of wrongful termination.

5. Plaintiff moves for amendment of judgment and relief from judgment or order in this Court's order, entered in open Court on June 6, 1983 denying Plaintiff's motion for reconsideration of its Order of May 31, 1983 relating to summary judgment.

6. Plaintiff moves this Court for amendment of judgment and relief from judgment or order relating to this Court's Order denying certification to the Supreme Court of the State of Colorado the issue of wrongful termination, which Order was entered in open Court on June 6, 1983.

7. Plaintiff moves for amendment of judgment and relief from judgment or order on this Court's denial of Plaintiff's motion for reinstatements of claims, which this Court denied in open Court on March 19, 1984.

8. Plaintiff moves for a new trial; amendment of judgment and relief from judgment or order based on the Court's denial of Plaintiff's motion for reconsider and reinstatement of claims made orally on March 24, 1984.

9. Plaintiff moves for a new trial; amendment of judgment and relief from judgment or order based on the Court's failure to allow amendment of pleadings which motion was made orally on March 24, 1984.

10. Plaintiff moves for a new trial; amendment of judgment and relief from judgment or order relating to the juries finding of no liability on behalf of Defendant pertaining to a claim of misrepresentation or concealment by Defendants.

11. Plaintiff moves for a new trial; amendment of judgment and relief from judgment or order based upon the juries finding of no liability in implied contract relating to the sale of spare parts and provisioning equipment to the Air Force in conjunction with the 157 PVD order.

As grounds for this motion Plaintiff would show the Court as follows:

a. On May 31, 1983 this Court entered an Order granting partial summary judgment to the Defendants;

b. The Court's Order granting partial summary judgment is legally erroneous, and improperly analyzes the laws of the State of Colorado in regard tot he questions of contract, implied contract, waiver, outrageous conduct, and wrongful termination;

c. The Cour't Order of May 31, 1983 further incorrectly analyzes factual evidence presented in support of the respective motion, including a total disregard of Plaintiff's Affidavit indicating that Plaintiff continued to discuss

the change in commission schedule with his supervisors and representatives of the company after the change was announced. The Court in granting summary judgment on this issue disregards the fact that waiver is an affirmative defense and that evidence in the record existed that waiver did not occur;

d. The Court's Order of May 31, 1983 is ambiguous, self contradictory and not supported by factual basis relating to the issue of waiver in that the Court permits Plaintiff to try the tort claim with the question of waiver being one for the jury, but does not permit the contract claim to be tried bacause the Court deemed waiver occurred;

e. The Court in its Order of May 31, 1983 erroneously concluded that wrongful termination is not a tort recognized in the State of Colorado. The Court failed to consider the totality of circumstances under which termination occurred, the fact that Colorado has not reviewed the question of whether an employer must fully comply with his own internal handbook and policies when terminating an employee, and whether an employer may terminate an employee to prevent the collection of commission;

f. The Court in its Order of May 31, 1983 erroneously ruled that the tort of outrageous conduct had not occurred. Substantial factual evidence was proffered to demonstrate that the elements of this tort were prima facially present;

g. The Court erroneously failed to certify the question of wrongful termination to the Colorado Supreme Court when requested by the Plaintiff although said questions were questions of first impression under the facts as set forth in this case;

h. The Court erroneously misapplied the facts and law both on Plaintiff's motion for reconsideration of the granting of partial summary judgment and Plaintiff's motion for reinstatement of claims both of which were filed prior to the trial;

i. The Court erroneously precluded Plaintiff from introducing Exhibits 14, 15 adn 170 relating to Becton Dickinson termination procedures and back dating of termination procedures following Plaintiff's termination, despite

Plaintiff's offer of proof and demonstration as to character evidence and evidence as to intent of Defendants in dealing with employees.

j. The Court erroneously precluded Plaintiff's introduction of Exhibits 39, 95, 102 and 124 relating to evaluations of the Plaintiff during the course of employment despite said evaluations being offered to rebut claims and testimony by the Defendant that Plaintiff was a chronic complainer, did not get along with supervisors and other information relating to Plaintiff's character;

k. The Court erroneously precluded the introduction of Exhibits 165 and 168 on the grounds of relevancy relating to the termination of Joseph Budinich (165) and Mr. Budinich's response (168), despite the fact that the question of waiver and propensity of Plaintiff to complain was affirmatively raised by the Defendants in pleading and in trial, and these letters demonstrated the nature and character of actions by the Defendants with Plaintiff in dealing with one another on this issue;

l. The Court erroneously precluded the question of punitive damages to be given to the jury and further erroneously precluded Exhibit 194 the 1981 annual report of Becton Dickinson from being introduced into evidence;

m. The Court erroneously precluded Plaintiff from introducing Exhibit 303, the letter from John McStravick to Interface dated 3/15/78 demonstrating the business and financial arrangements between the Defendant and their government consulting firm, when said evidence was offered for the purpose of demonstrating the relationship immediately after the Nasa procurement and the knowledge that Defendant would be paying substantial commissions on further government contract work;

n. The Court erroneously provided the jury a instruction, number 18, on independent investigation when there was no record of any evidence of any independent investigation;

o. The Court erroneously instructed the jury on waiver. Instruction number 19, did not conform to the existing case law and facts relating to waiver adduced through hearing, and did not comply with the standard jury instruction;

p. The Court erroneously provided an instruction on implied contract not in accordance with case law and the facts. This specific objection to instruction 20 relates to the Court's mistatement of the implied contract theory;

q. The Court erroneously gave jury instruction number 22 in that its limited recovery to a rate compensation applicable to sales made before termination;

r. The Court erroneously failed to give jury instructions tendered by the Plaintiff, instructions 1 through 8, and a package of instructions which the Court delinated as instructions 9 with subletters that were tendered at a prior trial.

For the foregoing reasons individually and inclusively Plaintiff request that for a new trial, and that a judgment or relief from judgment or order be entered in this proceeding as set forth herein.

[Signature and Certificate of Mailing omitted in printing]

MOTION FOR ATTORNEYS FEES DATED APRIL 2, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, Joseph Budinich pursuant to C.R.S. 1973, 8-4-114 hereby moves this Court to award attorneys fees as part of the costs of this action. As grounds for this motion Plaintiff will show the Court as follows:

1. Plaintiff initiated this action to recover certain commissions not paid the Plaintiff relating to the sale of certian propellant vapor detector equipment.

2. Plaintiff has been successful in obtaining a judgment relating to one or more of the commissions alleged not to have been paid by the Defendant.

3. C.R.S. 1973, 8-4-114 authorizes Plaintiff to recover attorneys fees as costs where he obtained a judgment for unpaid wages.

4. Unpaid wages are both salary wages or commission wages.

5. Plaintiff has filed with his Bill of Costs a statement as to the attorneys fees incurred prosecuting this matter and an Affidavit relating to the reasonable value of services provided copies of which are attached to this motion.

6. Plaintiff requests that this Court award to the Plaintiff attorneys fees reasonably incurred in the prosecution of this matter to a successful conclusion and judgment.

7. Plaintiff believes that a reasonable attorneys fees award of $52,198.00 is justified based upon an hourly rate of $90.00 per hour for all work done in calendar years 1981, 1982 and 1983 and $100.00 per hour for all work done in calendar year 1984.

[Signature and Certificate of Mailing omitted in printing]

AMENDED MOTION FOR NEW TRIAL, AMENDMENT OF JUDGMENT, RELIEF FROM JUDGMENT OR ORDER DATED APRIL 6, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, Joseph Budinich pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure hereby moves this Court for a New Trial, Amendment of Judgment and Relief from Amendment of Judgment or Order as grounds for filing this amended motion Plaintiff would show the Court as follows:

1. This matter was tried during the week of March 19, 1984 and a jury verdict entered March 23, 1984.

2. On March 26, 1984 the Judgment Order entered and was mailed to legal counsel on March 26, 1984, invoking mailing time.

3. The Judgment entered in this proceeding provides for no interest prior to judgment.

4. Plaintiff in this matter is entitled to prejudgment interests from the date the compensation was due or minimally from the date the Amended Complaint in this proceeding was filed.

5. C.R.S. 1973, 8-4-101 et. seq. and specifically C.R.S. 8-4-104 requires that payment be made when the wages are due. This statute controls the operation and running of interest because of its remedial nature and requirement that payment be made when the compensation is fully earned.

Plaintiff requests that the Court additionally correct the judgment entered by the Clerk to accurately calculate the running of interest from either February, 1982 or June, 1982.

Plaintiff additionally incorporates by reference all previous grounds raised in the original Motion for New Trial; Amendment of Judgment; Relief from Judgment or Order and Motion for Attorneys Fees and in no way waives any of the grounds either singularly or cumulatively as presented in the prior Motions and Bill of Costs submittals.

[Signature and Certificate of Mailing omitted in printing]

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL; AMENDMENT OF JUDGMENT; RELIEF FROM JUDGMENT OR ORDER DATED APRIL 6, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, Joseph Budinich submits this Memorandum in support of his Motion for New Trial; Amendment of Judgment; Relief from Judgment or Order and in support of his Application.

Plaintiff, Joseph Budinich has previously filed with this Court substantial Memorandums and Briefs relating to the various issued decided by the Court on Summary Judgment. In that some of these same issues are raised in Motion for New Trial Plaintiff incorporates by reference all previous Briefs and Memorandums submitted to the Court covering those issues. In addition Plaintiff without waiving any rights or arguments desires to bring before the Court certain other points of law applicable to the Motion for New Trial; Amendment of Judgment; Relief from Judgment or Order.

I. THE COURT HAS MISAPPLIED THE LAW IN THE STATE OF COLORADO ON COMMISSIONS.

The Court in its Summary Judgment Order of May 31, 1983 finds under the principles set out in Lampe v. Presbyterian Medical Center 590 P.2d 513, 514 (Col. App. 1978), that Plaintiff's employment as a matter of law was one being terminable at will. Plaintiff contests this legal finding by the Court based on the employee handbook, which Plaintiff believes was applicable throughout his employment. However, assuming for the sake of argument that this finding is correct, the fallacy of the Court's logic is contained within its next statement that an employment contract that is terminable at will is also modifiable at will; the modification having an effect of terminating the existing contract and substituting in its place a new contract with modified terms.

The innacuracy of the Court's May 31, 1983 statement is obvious when one examines the provisions of C.R.S. 1973, 8-4-101 et seq. and case law decided thereunder. Commissions, like those in the instant case clearly fall within the statutory and remedial prescriptions of 8-4-101 et seq. Specifically, 8-4-101(9) contemplates commission payments as being such a covered item. The case that most effectively established this principal and which has been repeatedly relied upon is Hofer v. Polly Little Realtors, Inc., 534 P.2d 114 (Colo. App., 1975). In Hofer the Court made it clearly held that an employee could not be deprived of a large commission on a transaction which had not closed through the employers termination of the employer/employee relationship. The exact words were:

> "Yet after the closing was held, Plaintiff and Intervenor had a claim against their employer for wages (which term includes commissions under Section 8-4-101(9)) for services fully earned and unpaid under Section 8-4-104. Any other interpretation would lead to the patently unjust result that salesmen employed on a commission basis could be terminated with impunity prior to a closing and thus deprived of large commissions obtained through for their employers as a result of their effort." (emphasis added)

The logical deductive process tells us that if an employer cannot terminate to prevent the collection of commissions, that he also cannot modify the contractural agreement and arrangement, whether or not a terminable at will situation exists. This is exactly what the Court of Appeals determined in Brogan v. Bill Eagers Motors, Inc., 561 P.2d 377 (Colo. App. 1977). Utilizing the logic and rationale established in Hofer, the Court extended by law the principal of protecting commissioned salesmen stating:

> "However here the dispute arose because the employer, for his own purposes attempted to modify unilaterally the contractural agreement and imposed a new condition (liquidation before determination of profit). As the Louisiana Appellate Court stated in a case construing a similar statute, "We do not think the statute permits the employers desires,

> conveniences or procedures to condition the payment of wages." Duhon v. Prof Erny's Music Co., supra. Brogan at 388.

Thus by 1977 the principal that the employer cannot unilaterally modify a commission schedule where the transaction is underway or substantially completed was firmly established in the State of Colorado. There is no case in the State of Colorado contradicting the principal, except for the Court's erroneous conclusions contained in its Order of May 31, 1983.

Plaintiff submits that the Court's holding regarding modification of the commission schedule, where substantial performance was completed or alleged to have been completed is inconsistent with Colorado law, Colorado principals of equity and fairness and Colorado statutory interpretation.

II. THE COURT ERRONEOUSLY SUMMARILY JUDGED THE QUESTION OF WAIVER

The Court in its Order of May 31, 1983 found that as a matter of law Plaintiff waived his right to the initial commissions under the original schedule in that Plaintiff continued employment and accepted full salary and commissions based on the modified scheduel. The Court further found that although Plaintiff voiced his disapproval of the modified schedule prior to adoption there is no evidence whatsoever to indicate that he ever objected to the schedule once adopted or refused to accept commissions under a new schedule.

Waiver is an affirmative defense that must be proved by the party raising it. Here the Defendants have raised the Doctrine of Waiver. Any fact demonstrating waiver had not occurred was sufficient to put that matter at issue. The Court in its findings of May 31, 1983 specifically overlooks the stipulated Pre-Trial Order entered between the parties and made the Order of the Court on December 14, 1982. In that Order, which was subsequently reaffirmed in the Amended Pre-Trial Order, paragraph 14 states and admits that "prior to and subsequent to October 1, 1979 Plaintiff and

Mr. McStravick discussed the modification of the commission plan." See page 9 of the PreTrial Order. Further, the Court has overlooked the affidavit in support of Plaintiff's Motion for Summary Judgment and in opposition to Defendant's Motion for Summary Judgment. That affidavit specifically states as follows:

> "Thereafter, the company implemented a change in the commission plan and implemented a large order category with a maximum of $10,000.00 commission for any single order. At no time did I consent to the modification of the plan. I discussed the plan with other regional managers, some of whom also found fault in the plan. Thereafter I wrote John McStravick about the modification in the commission plan. John responded by telling me that I could be fired from my letter. Subsequently, I raised the issue on several other occasions prior to receiving any compensation on the sale of equipment. After not securing any sign of cooperation from the company to resolve this matter I employed legal counsel who wrote John McStravick."

The affidavit submitted by the Plaintiff establishes the communications and discussions subsequent to the change of the plan which affirmatively defeats waiver. Even if the Court believes the affidavit is ambiguous, such creates a question of fact as to the nature and extent of the communications which only a finder of fact can determine.

Further, the Court's determination of waiver flies in the face of Mr. McStravick's deposition testimony which was included within the material filed with the Court relating to Summary Judgment. Specifically on pages 142 and 143, Mr. McStravick testifies as to Mr. Budinich's complaints after the change in commission schedule. Mr. McStravick expressly states that he received a letter from Joe Budinich after the change of commission schedule and became greatly upset at the letter. Mr. McStravick testifies he felt Mr. Budinich's letter of October 22, 1979 was in complete contrast to any agreement relating to changing the commission schedule. Mr. McStravick further indicates that he was aware in both Mr. Budinich's letters that Mr. Budinich

had strong reservations about the change in commission plans.

The Court is additionally wrong in its finding of waiver based on the fact that Mr. Budinich receive compensation under the modified large bonus plan or modified commission plan. The facts in the case are clear and no evidence exists in the record that any large order bonus was paid to Joe Budinich during employment except for $7,000.00 in July, 1981 relating to the sale of the equipment in question. The receipt of that monies is not waiver under Colorado law. C.R.S. 1973, 8-4-110 specifically provides in case of a dispute over wages, the employer shall pay without condition and within the time set by this article all wages or parts of wages conceded by him to be due leaving to the employee all remedies he might otherwise be entitled to as to any balance he may claim.

The Court can certainly not say as a matter of law waiver occurred, where the undisputed amount of $7,000.00 was paid in late July, 1981, Plaintiff continued to orally protest the payment thereafter, and in November, 1981 the Defendant corporation was notified in writing of the dispute and the amounts in dispute.

The Court's conclusion is obviously incorrect. If waiver occurred it is only by operation of fact, not law in this State. Colorado has a higher regard for the protection of employees and the standard utilized by the Court.

III. THE COURT ERRONEOUSLY MADE EVIDENTIARY RULINGS AND EXCLUDED TRIAL EXHIBITS IN THIS PROCEEDING

The Court precluded Plaintiff from inquiring into and introducing Exhibits 14, 15 and 170 relating to terminations procedures and backdating of terminations procedures, despite Plaintiff's offer of proof that the actions of Defendants was impeachment testimony and was also being introduced as character evidence and evidence of intent on propensity to client as the question of Defendant's honesty and integrity were expressly before the jury pertaining to questions of fraud and deceit. Defendants within this litigation both in Pre-Trial Statements, Pre-Trial Order and evidence introduced claimed a

good faith and honest basis for termination of Plaintiff. Further these Defendants indicated their good faith behavior toward employees in modifying the commission schedules and their manner of payment.

Plaintiff was entitled to attack these positions and impeach the Defendants by direct and circumstantial evidence of bad faith dealings. Plaintiff in introducing 14, 15 and 170 expressly directed those Exhibits toward the good faith intent issues and propensity issues. The Court's preclusion of this testimony is contrary to Rule 404, 405(b) and 406. For intent question see United States v. Preston, 632 F. 2d 1285 (10th Cir. 1980). For plan or scheme see United States v. Beauthume, 527 F. 2d 696 (10th Cir. 1975), cert. den. 425 U.S. 996. For previous positions see United States v. Bramble, 641 F. 2d 681 (9th Cir. 1981); for rebuttal see United States v. Johnson, 634 F. 2d 735 (4th Cir. 1980).

The Court additionally erroneously precluded other exhibits in this proceeding including exhibits 39, 95, 102 and 124 relating to evaluations of the Plaintiff during the course of employment. These exhibits were not tendered for any purpose relating to termination, but were specifically tendered to rebut claims and testimony of the Defendant that Plaintiff was a chronic complainer, did not get along with supervisors, and other information relating to Plaintiff's character, that was put into testimony and evidence by Defendant's agents, McStravick and Bogazyck. This testimony was proper rebuttal testimony and directly applicable on questions of waiver and business relationship between the parties. Rule 405(a) and (b) specifically permits such inquiries regarding character. Since Defendants put into question the Plaintiff's character the rules specifically allow inquiry into relevant and specific instances of conduct as well as general opinion evidence. The evaluations contained rebuttal opinions by McStravick and Bogazyck in evaluating Plaintiff's character. They are both evidence of good character and ability to work with supervisors and fellow employees, as well as impeachment evidence relevant to discrediting the testimony of Bogazyck and McStravick. See Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L Ed. 168 (1948).

The Court similarly erred in its preclusion of exhibits 165 and 168. Inherent within the question of waiver is the business relationship maintained by the parties. Plaintiff's intended use of exhibits 165 and 168 demonstrate the manner in which Joseph Budinich would protest decisions contrary to his likings. These exhibits were germaine as to plan or scheme, and predisposition. The mere fact that the documents go into the termination situation is not in itself the basis for preclusion.

IV. THE COURT ERRONEOUSLY INSTRUCTED THE JURY IN THIS CASE

The Court erroneously instructed the jury in this case. The instructions given to the jury which were erroneous were material and directly related to claims in which the jury found for the Defendant.

The initial improper instruction was instruction number 18. In that instruction the Court provided an instruction parallel to Colorado Jury Instruction 19:11 Reliance After Investigation. The notes specifically point out that the instruction should not be used when there is no evidence in the case that Plaintiff made his own investigation or examination. In this proceeding no evidence existed that Plaintiff made any investigation into the compensation commission schedule. The evidence was uncontradicted that Plaintiff relied solely on the information provided by Mr. McStravick. Providing instruction 18 was incorrect and prejudicial and is a basis for reversal.

The Court's instruction number 19 is an instruction on waiver. The Plaintiff's objection relates to the instruction in total and to the second portion of the instruction. That portion of the instruction reads "Nonetheless, with full knowledge of the fact this commission would be limited to $10,000.00 Mr. Budinich continued to work on the sale of PVD equipment to the United States Air Force when a reasonable person under the same or similar circumstances would not have done so." Plaintiff submits that the Court should not have given a waiver instruction in the instant case, because of the controlling case law cited above relating to commission and wages.

Alternatively, Plaintiff submits that if a waiver instruction were appropriate that the language should have only been the language contained in the model jury instruction.

The Plaintiff further submits that instruction 20 was erroneous. Instruction number 20 given by the Court does not comport with the model instruction and additionally is a mistatement of the law on commissions.

By not specifically addressing any items listed in the Motion for a New Trial, Plaintiff does not waive those objections or issues for purposes of the Motion or Appeal.

WHEREFORE, Plaintiff requests that this Court grant Plaintiff's Motion for New Trial; Amendment of Judgment; and Relief from Order.

[Signature and Certificate of Mailing omitted in printing]

MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR NEW TRIAL; AMENDMENT OF JUDGMENT; RELIEF FROM JUDGMENT OR ORDER DATED APRIL 6, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, Joseph Budinich submits this Memorandum dealing solely with the question of the operation of interest on the $5,000.00 Judgment entered in this proceeding. This Memorandum is submitted to clarify the question of interest on the implied contract claim for the 79 PVD units.

C.R.S. 1973, 8-4-101 defines "wages" or "compensation" to mean all amounts for labor or services performed by employeed whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculating the same or whether the labor of services performed in a contract, sub-contract, partnership, subpartnership, station plan or other agreement for the performance of labor services, if the labor of services to be paid is performed personally by the person demanding payment. The application of C.R.S. 1973, 8-4-101 et seq. has been specifically applied to commission situations similar to the 79 PVD order for which Plaintiff recovered judgment.

In the case of Hofer v. Polly Little Realtors, Inc., 543 P.2d 114 (Colo. App. 1975) Colorado Court of Appeals specifically found the wording of Section 8-4-104(1) provides for immediate payment of wages or compensation for labor or services earned and unpaid at a time of discharging an employee by an employer. Hofer at 117, The Court of Appeals stated:

> "Section 8-4-104(2) however, speaks to the situation. It states that at the time that employment relationship is severed, an employer need not immediately compensation not yet fully earned under a compensation agreement. The implication is clear that such wages become immediately due at the time they are fully earned."

The Court of Appeals in Hofer further went on to say that the wages were payable upon the completed sale of the property. In the instant matter the analogy is the same, that the wages were immediately payable upon receipt of the official government contract in February, 1982. Minimally, commissions were payable at the time demand was made for the commission by the Plaintiff Joseph Budinich in the Amended Complaint filed in June of 1982.

Similarly, treatment of interest is dictated by the remedial nature of C.R.S. 1973, 8-4-101 et seq. See Hartman v. Friedman, 591 P.2d 1318, 1321 (Colo. 1979).

[Signature and Certificate of Mailing omitted in printing]

MEMORANDUM IN SUPPORT OF ATTORNEYS FEES AS COSTS DATED APRIL 6, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Joseph Budinich has filed with the Clerk of the District Court his Bill of Costs. An item in this Bill of Costs relates to the payment of attorneys fees. The right to attorneys fees as a cost item is found within C.R.S. 1973, 8-4-114. The heading of this section is entitled "Employee May Recover Attorney Fees." This section specifically provides for inclusion of attorneys fees as costs in securing the judgment against the Defendant.

The Colorado Supreme Court has laid out an eight prong test in examining reasonable attorneys fees. Mau v. E.P.H. Corp., 638 P.2d 777 (1981). The factors to be considered are:

1. Time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

2. The likelihood, if apparent to the client, that acceptance of a particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. The time limitations imposed by the client or by the circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation and ability of the lawyer or the lawyers performing the services.

8. Whether the fee is fixed or contingent.

In that the instant action is a diversity proceeding, it is submitted that the Mau criteria are proper criteria for evaluating attorneys fees in the instant case.

The alternative criteria established in Mau would be the Federal criteria set forth in Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980) and Johnson v. Georgia Highways Express, Inc., 488 F.2d 714 (5th Cir. 1974). These cases examined attorneys under the Federal Civil Rights Act, 42 USC 1988. Those

cases utilize criteria similar to that espoused in Mau.

The Supreme Court in the decision of Hartman v. Friedman, 591 P.2d 1318 (1978) established the principal that in awarding attorneys fees the award must be reasonable. The Court however went on to say that the determination of reasonableness is a question of fact based on a variety of criteria. The fact that the award of attorneys fees may be 100% of the judgment or in excess of 50% of the judgment or in excess of the judgment itself is not a relevant factor. The social policy involved of insuring that employees receive compensation when due is the controlling criteria under Colorado law. See Hartman v. Friedman, supra at 1321 and 1322.

Utilizing the criteria established in Mau it is apparent that a sizeable recovery in attorneys fees is appropriate in the instant case. The controlling factors involve the state statute that mandates payment of compensation when due; the extensive time expended in the discovery stages of this litigation; two trials and the preclusion of other work because of the case. Additionally, the Court should consider the other factors enumerated in Mau.

In making these considerations the Court should consider the fact that Defendant declined to produce the majority of information in the State of Colorado. Plaintiff's counsel was required to twice travel to the State of New York for the purposes of conducting discovery with documents and taking depositions. Further, Plaintiff's counsel was required to travel to the States of Florida, Illinois and Utah for the purposes of taking depositions to preserve testimony and obtaining substantial background information.

The difficulties created by distance in this matter impose other considerations which warrant a large attorneys fee award.

The fact that this case was taken on a contingent fee basis does not mitigate or detract from the expenditures, complexity, difficulty and time imposition problems posed by the litigation. Of course, these factors must all be considered by the Court.

In order that the Court better evaluate the attorneys background counsel

has submitted with this Memorandum an attorney affidavit regarding his background and training.

[Signature and Certificate of Mailing omitted in printing]

MOTION TO REVIEW TAXATION OF COSTS DATED APRIL 13, 1984 FILED BY PLAINTIFF IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, by and through his attorney, hereby moves the Court for review of taxation of costs in this matter. As grounds for this Motion Plaintiff would show the following:

1. Plaintiff in this matter timely filed its Bill of Costs. A copy of that Bill of Costs is attached to this pleading and incorporated herein.

2. On April 10, 1984, Plaintiff through legal counsel appeared before the Clerk of the District Court for taxation of the Bill of Costs as submitted.

3. Counsel for Defendant Becton Dickinson and Company was present.

4. The Clerk of the District Court upon application of the Plaintiff for taxing costs refused to tax any of Plaintiff's costs without Order of the Court.

5. The Clerk of the Court indicated that with approval of this Court it would tax certain costs, appearing on Plaintiff's Bill of Costs, but needed such an Order before proceeding. The costs the Clerk of the District Court indicated that were appropriate taxable costs upon Order of the Court were:

   a. Fees of the Clerk.
   b. Fees for Service of Summons.
   c. Depositions used for substantive testimony appearing in Attachment A.
   d. Certain witness and service fees appearing in Attachment B.
   e. Certain fees appearing in Attachment E.

6. Plaintiff's cost as indicated above are applicable and appropriate fees and costs that are taxable in this matter pursuant to C.R.S. 1973, 8-4-101 et. seq., and the Federal Rules of Civil Procedure.

7. Further, Plaintiff submits that the other costs submitted int he Bill of Costs are true and appropriate costs for taxing in this action.

8. The Clerk of the Court on the aforementioned date taxed costs in the amount of $1,410.00 against the Plaintiff in this action. This taxation was done pursuant to Rule 68, of the Federal Rules of Civil Procedure, although Defendant's Motion to Tax Costs pursuant to Rule 68 is still pending with the Court.

9. Plaintiff objects to the taxing of costs pursuant to Rule 68, based on his response to Defendant's Motion to Tax, which response is incorporated herein.

10. Further, Plaintiff objects to any taxation of costs in this proceeding in that Defendant failed to file any Motion for New Trial, Amendment of Judgment, Relief from Judgment or Orders.

11. This Court should remand to the Clerk of the Court the question of taxation of costs as permitted under Colorado Statute, C.R.S. 1973, 8-4-101 et. seq. and under the Federal Rules of Civil Procedure, and appropriate case law.

WHEREFORE, Plaintiff requests that this Court Order the question of taxation of cost be remanded to the Clerk of the Court for taxation of Plaintiff's costs, and further that the Court disallow taxation of costs to the Defendant, pursuant to Rule 68, Federal Rules of Civil Procedure.

[Signature and Certificate of Mailing omitted in printing]

MOTION FOR AMENDMENT OF ORDER OR, RELIEF FROM JUDGMENT AND ORDER DATED JULY 13, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, by and through his attorney, hereby moves this Court to amend, modify and alter its Order of July 3, 1984 awarding Plaintiff $1,000.00 in attorney fees. As grounds for this Motion, Plaintiff would show the Court as follows:

1. The Court Order of July 3, 1984 is entered without finding specific facts and basis as to the manner and means in which the attorney fees of $1,000.00 was awarded.

2. The July 3, 1984 Order is arbitrary, capricious and without factual and legal basis.

3. The July 3, 1984 Order is erroneous and is a wrongful penalty imposed upon the Plaintiff.

4. The July 3, 1984 Order does not adequately apply the required criteria of Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981) Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980) and Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

5. The July 3, 1984 Order was entered without an opportunity for Plaintiff to respond to Defendant's position, as requested by Plaintiff.

6. The Court Order effectively awards less than 12 hours of attorney time regarding the litigation and can not be justified under any circumstances.

7. The Court's Order does not accurately analyze Defendant's offer of judgment.

8. The Court awarding costs of Defendant is incorrect.

WHEREFORE, Plaintiff requests that this Court amend, modify and alter the Order and appropriately award attorney fees pursuant to criteria of Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981)' Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980) and Hensley v. Eckerhart, 103 F. Ct. 1933 (1983).

MEMORANDUM IN SUPPORT OF MOTION FOR AMENDMENT OF ORDER OR, RELIEF FROM JUDGMENT AND ORDER DATED JULY 13, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, in support of its Motion For Amendment of Order or, Relief from Judgment and Order dated July 3, 1984 submits this Memorandum.

I. BACKGROUND

On March 23, 1984 a Federal jury returned a verdict in favor of the Plaintiff relating to owed commissions on the sale of 79 P.V.D. Units to the Air Force. The jury's verdict was a maximum verdict under the Court's instruction to the jury. Pursuant to this verdict, Plaintiff's counsel filed a Motion For Attorney Fees pursuant to C.R.S. 1973, 8-4-114. Defendant opposed this Motion arguing that C.R.S. 1973, 8-4-114 was not applicable to claims in implied contract. The Court on May 14, 1984 granted the Motion For Attorney Fees and directed that Plaintiff submit a statement and all documentation pursuant to the proportionate recovery rule.

Pursuant to Court Order, Plaintiff submitted its statement and supporting material. Thereafter, Defendant submitted its reply. Plaintiff moved to reply to Defendant's position but prior to ruling on this request, the Court entered its July 3, 194 Order awarding Plaintiff $1,000.00 in attorney fees.

II. THE COURT'S JULY 3, 1984 ORDER LACKS SUFFICIENT FINDINGS OF FACTS

This Court over a ten year period has often ruled on attorney fee questions. The Court's rulings have traditionally been thorough and exhaustive setting forth specific factual determination requests to determine appropriate

attorney fees. The instant Order fails to make such factual determinations and is defective under the applicable criteria established in Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981); Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980) and Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

The Court failed to state how it made the $1,000.00 determination. The award is just announced. It does not reflect an hourly rate basis, nor is it limited to a contingent fee rationale. The award is an arbitrary figure selected by the Court.

No justification exists to select an arbitrary figure for compensation in that Plaintiff submitted affidavits as to the actual hourly rate of $90.00 per hour for all work done in calendar years 1981, 1982 and 1983 and $100.00 per hour for all work done in calendar year 1984. These figures were uncontested by Defendant and no counter affidavit was filed. The Court inappropriately failed to find that a rate of $90.00 per hour was the controlling rate for Plaintiff's work.

The Court further failed to factually determine the hours it would allow Plaintiff for work performed that was directly related to Plaintiff's claim, despite Plaintiff's detailed analysis of the time elements. At best, the Court merely discusses some categories it will not allow, but makes no determination what it did allow and what should be discounted.

The only evidence before the Court as to the allowable time is Plaintiff's submittal. This submittal shows that prior to offer of judgment, based on a $90.00 per hour figure, Plaintiff should recover $11,491.74. Defendants provided the Court no mathematically justifiable calculation to the contrary.

The Court in its Order at best indicates that it would disallow some costs for travel time and discovery of unrelated witnesses. It is a correct assessment, any reduction from the pre-offer of judgment would produce a figure substantially greater than the $1,000.00 awarded.

As an example of the Court's failure to make specific factual findings leading to erroneous conclusions, the Court fails to determine exactly what amount of travel time was included in calculating the amount due before offer

of judgment. The Defendant told the Court that approximately 47 hours of time was included, but this in fact is inaccurate. Although Plaintiff may have spend 47 hours traveling, less than 12 hours are considered allocable toward this claim. All other travel time was not considered. This means that even if the Court excludes all twelve hours, although clearly some hours should be credited for the time spent doing discovery with Defendant's employees and Lamar Carpenter, a deduction of only $1,080.00 would be in order.

Simularly, if the Court were to discount all time allocated to discovery with Dr. Stetter, Thomas Meeks, Steve Prince, Ralph Wingo and Cal Thorp, the total time is less than five hours as prorated by Plaintiff, including travel time which the Court has previously deducted. The actual time remaining after travel time is approximately 2 hours, or $180.00.

The Court is thus left with over $9,000 of allowable attorney fees that is reduced to $1,000.00.

The Court's Order is silent on how it reached the figure of $1,000.00. The Order makes no determination of what was the reasonable allowable fee for discovering essential and critical documents on 79 P.V.D. orders that were only produced in New York State, for the taking of Lamar Carpenter's deposition that was read into the record as testimony clearly indicating that the sale of the 79 P.V.D. Units completed the Plaintiff's last day of employment; for representing Mr. Budinich while his deposition was taken on two occasions; for assembly of all relevant documents on the second P.V.D. sale; for deposing Charles Curry on the second P.V.D. Sale; for deposing Mr. McStravick on company policy relating to payment of commissions on large sale orders; and for trying this case to a jury.

Without such a factual analysis, this Court's Order is without a sufficient basis and is in error.

III. THE COURT'S AWARD OF $1,000.000 IS A PENALTY AND THEREFORE IMPROPER

The Court's Order awarding $1,000.00 in attorney fees serves as a penalty and is contrary to the legislative intent of 8-4-101, et. seq. As pointedly set

out by the Colorado Supreme Court in the case of Hartman v. Friedman, 591 P.2d 1318 (1978), the social policy of awarding reasonable attorney fees to a prevailing Plaintiff in a wage case is to insure that employers pay wages when due. The Court's award in this case clearly circumvents that social policy, particularly where this Defendant has engaged in a militant defense. See Perkins v. New Orleans Athletic Club, 427 F. Supp. 661 (D.C. of E.D.L.A., 1976).

This Court's token award of attorney fees is punitive. Rejection of an offer of judgment has its own sanctions. No justification exists in rule or law for supplemental punishment by reduction of already earned attorney fees.

Plaintiff requests the Court to re-examine the records and manner of fee determination and to award the fees actually earned.

IV. CONCLUSION

This Court has submitted substantial error in its Order of July 3, 1984. Plaintiff submits that this Court should vacate the Order, allow Plaintiff to file a reply and point out to the Court the obvious inaccuracies of Defendant's position and enter an appropriate Order relating to attorney fees.

[Signature and Certificate of Mailing omitted in printing]

NOTICE OF APPEAL DATED AUGUST 28, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

NOTICE IS HEREBY GIVEN that the Plaintiff above named hereby appeals to the United States Court of Appeals for the 10th Circuit, from this Court's Order entered May 14, 1984 denying Plaintiff's Motion for New Trial, Amendment of Judgment, Relief from Judgment or Order and this Court's Order entered August 1, 1984 denying Plaintiff's Motion for Amendment of Order or Relief from Judgment and Order.

[Signature and Certificate of Mailing omitted in printing]